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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of VICTORIA and PHILLIP C. MYERS.	B252708 (Los Angeles County Super. Ct. No. ND056472)
ANDRE C. MYERS, as Executor, etc., Appellant, v. PHILLIP C. MYERS, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, John Chemeleski, Commissioner. Affirmed.

Law Offices of N.R. Bauer and Nene Bauer; Law Office of Thomas Armstrong and Thomas Armstrong for Appellant.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody and David P. Pruett for Respondent.

Appellant Andre C. Myers, serving as executor of the will of Victoria C. Myers, appeals from the judgment entered in a marital dissolution action between Victoria and her former husband, respondent Phillip Myers.[1] Victoria alleged Phillip breached his fiduciary duties under Family Code sections 721, 1100, and 2100 *et seq*. by using a corporate entity to conceal proceeds he received from a land sale in Costa Rica. The trial court found Victoria had failed to prove her claims, and entered judgment in Phillip's favor.

On appeal, Victoria argues that the trial court erred in assigning her the burden of proof on her claims. She further contends that, even if she did have the burden of proof, the evidence established her claims. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Summary of the Parties' Dispute

Victoria and Phillip were married in February of 1963. They separated in April of 2006, and Victoria filed a petition for dissolution of the marriage on December 8, 2006. In November 2009, the parties commenced trial on contested issues involving Phillip's sale of a large piece of land in Costa Rica known as "Zapotal."[2] Phillip alleged he had sold his interest in Zapotal to a corporate entity named Development Investment Consult (DIC)

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[1] As is customary in dissolution proceedings, we refer to the parties by their given names for clarity of reference, and not out of disrespect. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 46, fn. 1.)

[2] The trial also addressed several additional contested issues that the parties settled prior to the entry of judgment. None of those issues are relevant to this appeal.

for $15 million, and that DIC then resold the property to an American corporate entity named Union Box for $31 million. Phillip asserted that after DIC completed its sale to Union Box, it paid him the original $15 million sale price, plus approximately $6 million in additional payments related to the transaction. Phillip argued that DIC retained the remaining proceeds of the sale, and that he did not have any interest in those funds.

Victoria, however, argued that Phillip's sale to DIC was a sham, and that DIC was in fact his alter-ego. She further asserted that he was the owner and beneficiary of the entire $31 million payment DIC received from Union Box, and that he intentionally withheld this information from her to shield his assets.

B. Evidence at Trial

1. Testimony of Phillip

Phillip testified that he began investing in Costa Rican real estate in 1989, and that his first purchase was a large farm known as Guacayama, which he obtained for $600,000. One or two years later, he bought a second property known as "Riscos de Bahia," which bordered Guacayama, and then subdivided a portion of Guacayama into a third property known as "El Zanate Verde." Phillip stated that he held title to each of the properties through a separate corporate entity, and that he had used local counsel to advise him on the transactions.

Phillip testified that in the early 2000s, he learned that Golfina, a development group based in Switzerland, was seeking offers for a large piece of property adjacent to Guacayama known

as Zapotal.[3] Phillip stated that Golfina's sales agent, David Gorman, contacted him about purchasing Zapotal because Phillip owned adjoining property. Gorman told Phillip that Golfina was willing to sell an option to purchase Zapotal for $6 million. Although Gorman was acting as Golfina's sales agent, he also advised Phillip that he knew numerous investors who would be interested in purchasing Zapotal with Phillip, and establishing a joint venture to develop the property. Gorman, however, was ultimately unable to secure any capital or investors, and Phillip agreed to purchase Zapotal on his own.

The option contract between Phillip and Golfina permitted him to pay the $6 million purchase price in installments. Phillip was required to make an initial payment of $1 million by the end of 2004, and a second $1 million payment by the end of 2005. The remaining $4 million was to be paid in future installments. The contract authorized Golfina to accelerate the debt at any time, and to cancel Phillip's option if he was unable to make the full payment.

While Phillip was in negotiations with Golfina, a United States-based development group named Union Box offered to purchase Guacayama for $8 million. Phillip retained Ana Madrigal, a Costa Rican real estate attorney, to advise him on the transaction, which was completed in October of 2005. Union Box also agreed to purchase Phillip's other two properties, Riscos

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[3] Phillip clarified that the land rights to Zapotal were actually held by six different holding companies that Golfina owned, and that Golfina was seeking to sell the holding companies. For purposes of simplicity and clarity, unless otherwise noted, we collectively refer to the six holding companies and the land that they held as Zapotal.

De Bahia and El Zanate Verde, for approximately $3.5 million. Phillip used proceeds from those land sales to pay a portion of the first two installments he owed Golfina under the Zapotal option agreement.

During this same time period, Gorman had been showing Phillip additional development properties throughout the region, which included land in Curacao and St. Lucia. According to Phillip, Gorman recommended that they establish a corporate entity to facilitate any joint ventures they might pursue together in the future. Phillip recalled that Gorman and Madrigal had looked at Panama as a country where they might incorporate a holding company for future development.

Phillip stated that, after acquiring the option to purchase Zapotal, he entered into negotiations to sell the property to Union Box. Phillip testified that Union Box was an aggressive negotiator, and frequently made offers that it later rescinded. Phillip stated Union Box had previously convinced him to sell Riscos De Bahia and El Zanate Verde at below market prices by promising that it would pay him a premium for Zapotal if it ever decided to acquire that property. In late 2005, Union Box made an offer to purchase a portion of Zapotal for $15 million, with an option to purchase another portion of the property for $8 million. Although Phillip signed a letter of acceptance, Union Box subsequently rescinded the offer.

Phillip testified that after his sales deal with Union Box fell through, he decided to seek other buyers for Zapotal. Phillip explained that he wanted to sell Zapotal because he believed Costa Rican real estate was in a bubble, and he had heard rumors that other investment groups were trying to persuade Golfina to rescind his Zapotal option. Phillip also stated that he

became concerned about the structure of the six corporate entities that owned Zapotal, which he would acquire if he actually exercised his Zapotal option. (See *ante*, p. 4, fn. 3.) Phillip explained that the entities were "multi layered tax structures that went all the way to the Netherlands," and that he was "very uncomfortable" with the tax complications they might present.

In December of 2005, Phillip directed Madrigal and Gorman to try to find a buyer for his Zapotal option. Phillip stated that he believed Gorman and Madrigal were well positioned to identify credible buyers because Gorman had been personally involved with Zapotal for over 20 years, and Madrigal represented "very significant capital groups and wealthy individuals that were involved with major properties in Costa Rica." Phillip stated that he knew Gorman and Madrigal had each sought to identify buyers for the property, but he was not certain how they had gone about their work.

In January 2006, Madrigal informed Phillip she had put together an investment group that wanted to purchase his Zapotal option. Phillip testified that Madrigal had restructured a previously-existing corporate entity named DIC to use as a vehicle for acquiring Zapotal. Phillip stated that he did not have any specific knowledge regarding how DIC was formed, and denied having directed Gorman or Madrigal to form the entity. He also testified that he never owned any interest in DIC, and had no knowledge of who was in Madrigal's investment group.

Phillip initially offered to sell his Zapotal option to DIC for $20 million, but eventually accepted a counteroffer of $15 million. Under the terms of the deal, DIC was required to make a nonrefundable down payment of $50,000. The remainder of the $15 million was contingent on DIC successfully reselling Zapotal.

If DIC was unable to sell the property within one year, ownership would revert to Phillip. The parties further agreed that if DIC sold the property to Union Box, Phillip would receive an additional $2.125 million payment. Phillip explained that this extra payment reflected the amount he believed Union Box had underpaid him for Riscos de Bahia and El Zanate Verde.

At the request of DIC, Phillip agreed to keep the sale confidential because DIC did not want the public or Gorman to know it had acquired the rights to Zapotal. Phillip also agreed to assist DIC in marketing and selling the property. Phillip explained that DIC preferred to have him serve as "the front" for any future sales involving Zapotal because he had preexisting relationships with multiple prospective American buyers, including Union Box, and because American buyers often felt more comfortable dealing with American sellers than with Central American sellers. Phillip further explained that he was willing to help DIC sell the property because he would not receive his $15 million unless DIC successfully resold the property.

Phillip testified that, after agreeing to sell his Zapotal option to DIC, he loaned DIC approximately $4 million to pay off the remainder that was due to Golfina under the original option agreement. Phillip explained that he agreed to make the loan because he was concerned DIC would be unable to make the $4 million payment if Golfina elected to accelerate the debt. DIC agreed it would then repay him the $4 million when it resold the property.

Phillip testified that, in June of 2006, Union Box agreed to buy Zapotal from DIC for $31 million. After the sale closed, DIC paid him $15 million through a series of installment payments that concluded around 2010. DIC also paid him the $2.125

million they had agreed to in the event Union Box was the purchaser of the property, and repaid the $4 million loan. DIC retained the remainder of the Zapotal sale proceeds, less the costs and expenses associated with the transaction.

Phillip acknowledged that DIC's sale to Union Box had occurred only six months after Union Box had declined to buy the Zapotal property from him at a substantially lower price. When asked why he believed Union Box had agreed to buy the property from DIC at a higher price, Phillip stated that it was difficult to predict how developers such as Union Box would act with respect to large development properties, and acknowledged he was surprised Union Box chose to buy Zapotal at that price.

Phillip testified that he paid federal and state taxes on the proceeds he received from DIC, and transferred all remaining funds to multiple U.S. financial accounts that he held jointly with Victoria. Phillip explained that the funds in these accounts were later consolidated into a single Ameritrade account. Phillip further asserted that he was not holding any money that he received from the Zapotal transaction outside of the United States, and had no interest in the profits DIC had made from the sale.

2. Testimony of Ana Madrigal

Ana Madrigal testified that she had served as a real estate attorney in Costa Rica for 17 years, and had represented numerous domestic and foreign clients in large land transactions. Madrigal stated that she initially provided legal services to Phillip regarding the administration of the Guacayama property, and later advised him on the sale of that property to Union Box. Madrigal was also aware that Phillip had sold Bahia de Riscos and El Zanate Verde to Union Box for approximately $3.5

million. According to Madrigal, Phillip believed he had sold those two properties under market value, but had agreed to do so because Union Box promised him it would pay him a premium for Zapotal if it chose to buy that property.

Madrigal testified that Phillip provided her a copy of the Zapotal purchase option agreement he had entered into with Golfina. The agreement, which was admitted into evidence, required Phillip to pay Golfina $6 million through a series of installment payments. Madrigal stated that Phillip had paid Golfina $1 million with funds from his American accounts, and directed her to pay Golfina a second $1 million payment using proceeds from his other Costa Rican land transactions, which Madrigal had been holding in a trust.

Madrigal testified that Golfina had retained David Gorman to find a buyer for Zapotal, which had been on the market for over a decade before Phillip entered into the option agreement. Madrigal explained that, while Gorman was negotiating the Zapotal sale with Phillip, he was simultaneously pitching Phillip on various development ventures involving Zapotal and other properties in the region. Madrigal recommended to Phillip that, before engaging in any further discussions with Gorman, he and Gorman should establish and capitalize a new corporate entity that they could then use "to develop the new projects." She testified that DIC was initially set up for that purpose, but Gorman and Phillip never actually did anything with the entity.

In late 2005, Phillip informed Madrigal he wanted to sell his option on the Zapotal property, and requested that she try to find a purchaser. Madrigal and Jose Gomez, who had also provided legal services to Phillip, put together an investment group to buy the property. Madrigal testified that she and

Gomez decided to capitalize DIC, and use the entity to purchase the Zapotal option from Phillip.

Madrigal's testimony regarding the terms of the purchase agreement between Phillip and DIC was consistent with Phillip's testimony. Specifically, she testified that Phillip and DIC agreed that: (1) DIC would acquire the Zapotal option for $15 million, with a $50,000 down payment; (2) the $15 million sales price would be paid in installment payments that would become due only if DIC was able to resell Zapotal; (3) if DIC was unable to resell Zapotal within one year, the property would revert back to Phillip; (4) Phillip would loan DIC $4 million to pay the remainder that was due on the option agreement with Golfina; (5) if DIC sold the property to Union Box, DIC would provide Phillip an additional payment of $2.125 million.

Madrigal further testified that Phillip agreed he would keep the sale of his Zapotal option to DIC confidential to all outsiders, including Gorman, and help DIC resell the property. Madrigal testified that DIC wanted to keep the sale confidential from Gorman because it was concerned he would try to become part of the purchase group, explaining that Gorman had a "bad habit to always get involve with partner in companies without putting any money and we don't want him to think he was part of DIC without having put in any money [*sic*]." DIC, however, also wanted to maintain a good relationship with Gorman because it believed he might be able to help identify potential buyers for Zapotal. Madrigal clarified that Gorman was aware Phillip had transferred ownership of the Zapotal option to DIC, but he was unaware that Phillip did not own DIC, and had in fact sold his interest in Zapotal to DIC.

Madrigal explained that DIC wanted to keep its ownership interest in Zapotal confidential from the general public so that Phillip, who had good relationships with Union Box and other potential American buyers, could continue to appear to be the seller. Madrigal explained that American buyers generally preferred to buy property from other Americans, rather than from Central American owners.

Madrigal authenticated corporate minutes and other corporate documents that indicated she was the president of DIC, and that DIC had agreed to purchase the Zapotal option from Phillip in January of 2006. She also authenticated a three-page written agreement signed by her and Phillip that set forth his sale of the Zapotal option to DIC.[4] Madrigal explained that the sale between Phillip and DIC did not have to be publicly registered because it was a private agreement. Madrigal stated that she and Gomez had drafted the written agreement.

Madrigal also authenticated a notarized document she had requested from DIC's counsel in Panama that verified Phillip had never been a shareholder, director, officer or executive of DIC. Madrigal testified that Phillip never held any interest in DIC or its assets.

3. Testimony of Jose Gomez

Jose Gomez testified that he had served as an attorney in Costa Rica for over 40 years, and had provided Phillip legal advice regarding multiple land transactions in Costa Rica. Gomez stated that he had also worked with Ana Madrigal on

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[4] Although the sales agreement between Phillip and DIC was admitted into evidence, Victoria did not include a copy of the agreement in the Appellant's Appendix.

various business matters, including the purchase of Phillip's Zapotal option.

Gomez testified that he and Madrigal owned DIC with a third person named Jorge Chinchilla, who had served as Phillip's accountant in Costa Rica. Gomez authenticated a shareholder registry issued by the Panamanian government that showed he, Madrigal and Chinchilla collectively owned all of DIC's outstanding 10,000 shares. He also testified that he possessed physical stock certificates in the same amounts listed in the registry, and that Phillip had never been an owner, shareholder or beneficiary of DIC.

Gomez also provided testimony about the formation of DIC. He explained that near the end of 2005, Phillip and Gorman had discussed establishing a joint venture for possible future real estate investments, which led to the formation of DIC. According to Gomez, however, Gorman never provided any money to capitalize the venture, "so that was it."

Shortly thereafter, Phillip approached Madrigal about finding a buyer for the Zapotal option. Madrigal then contacted Gomez and Chinchilla to discuss the issue. The three of them put together a group of investors to buy Zapotal, and negotiated the terms of the sale from Phillip to DIC. Gomez explained that he believed the terms of Phillip's offer were very favorable because DIC was only required to make a $50,000 down payment. The remainder of the $15 million sales price would only become due if DIC was able to resell Zapotal, with the property reverting to Phillip if DIC was not able to complete a sale within one year. Gomez confirmed Phillip had also agreed to lend DIC approximately $4 million to pay off the remainder due on the original option contract with Golfina.

Gomez testified that, after DIC sold Zapotal to Union Box for $31 million, it paid Phillip $15 million in installment payments over several years. DIC also repaid Phillip the $4 million loan, along with the $2.125 million the parties had agreed to in the event Union Box purchased Zapotal.

Gomez testified that DIC was still an active entity and had made numerous additional real estate investments after the sale of Zapotal. Gomez testified Phillip had no interest in any of DIC's investments or its profits from the sale of Zapotal.

4. Testimony of Jorge Chinchilla

Jorge Chinchilla testified that he had served as a certified public accountant in Costa Rica for over 20 years, and had provided tax accounting services to Phillip regarding the sale of Guacayama. Chinchilla explained that Madrigal approached him and Gomez near the end of 2005 about putting together an offer to purchase Phillip's Zapotal option. Chinchilla stated that Madrigal had chosen to include him in the business venture because he had prior accounting experience on large, Costa Rican land transactions.

Chinchilla stated that he had established DIC with Madrigal and Gomez to buy Phillip's Zapotal option. Chinchilla explained that although Gorman had originally selected the name of the entity, Gorman was never an owner or shareholder of DIC. Chinchilla also testified that Phillip was never a shareholder or owner of DIC, and that DIC was not holding any assets for him.

Chinchilla's testimony regarding the terms of the sale between Phillip and DIC was consistent with the prior testimony of Phillip, Madrigal and Gomez. Chinchilla also stated that Phillip and Madrigal had signed a written agreement setting

forth terms of Phillip's sale of his Zapotal option. Chinchilla asserted that DIC made a strategic decision to keep the sale confidential, and to use Phillip as the "face" of the sales campaign. Chinchilla explained that there was no requirement under Costa Rican law to publicly register or otherwise disclose the sale between Phillip and DIC.

During his testimony, Chinchilla reviewed a series of documents showing distributions DIC had made from the proceeds of the sale to Union Box. Chinchilla explained that the documents showed DIC paid Phillip $15 million in a series of installments that ended in 2009. DIC also distributed approximately $4 million to Phillip in November of 2006, which reflected a loan repayment, and made an additional payment to Phillip of approximately $2.125. Chinchilla testified that DIC made a profit of approximately $9 million on the transaction, and that Phillip had no interest in any of that money.

5. Testimony of David Gorman

David Gorman testified that he met Phillip in the mid-1990s, and had originally proposed that they partner together to sell Guacayama and Zapotal (then owned by Golfina) to a single buyer. Gorman stated that he later provided Phillip advice and assistance regarding the sales of Guacayama, El Zanate Verde and Riscos de Bahia.

Gorman testified that, before Phillip purchased the Zapotal option in 2004, Golfina had assigned Gorman a 10 percent ownership interest in the property. Gorman further asserted that when Phillip bought the Zapotal option from Golfina, Gorman had agreed to include his 10 percent interest in the sale to simplify the transaction. According to Gorman, in exchange for this 10 percent interest, Phillip agreed he would transfer

ownership of the Zapotal option to a corporate entity he and Gorman would establish at some later point, and then sell Gorman a 25 percent ownership interest in the newly-established corporate entity for $1.5 million, which represented 25 percent of the amount Phillip had agreed to pay Golfina. Gorman stated that he had intended to pay Phillip this $1.5 million with money that Golfina owed him for services he had performed in relation to the Zapotal property. Gorman, however, was not able to pay Phillip the $1.5 million at that time because Golfina withheld payment until mid-2007.

Gorman acknowledged that the Zapotal option agreement between Phillip and Golfina did not include any language indicating that Gorman owned a 10 percent interest in the property, or that he had had agreed to include his 10 percent interest in the sale. Gorman also admitted he was not aware of any signed document confirming that Phillip had agreed to give him a 25 percent interest in the Zapotal option, or in the corporate entity that held the Zapotal option. Gorman asserted that his agreement with Phillip was reflected in e-mails Phillip had written in October 2006, and further asserted that Phillip was supposed to sign a written agreement reflecting the 75/25 split, but had never returned a signed copy of the document.

Gorman stated that, in 2005, he traveled to various countries with Phillip and Madrigal to investigate the best location to establish a corporate entity that could be used to hold the Zapotal option. Gorman testified that they eventually decided to establish an entity in Panama, and named the entity DIC. Gorman asserted that DIC was established to facilitate the sale of Zapotal, and was not intended to facilitate any other investments or joint ventures between him and Phillip.

Gorman testified that he and Phillip had always planned to sell Zapotal, and had been actively seeking a buyer ever since Phillip acquired the Zapotal option. Gorman asserted that in late 2005, Union Box had offered to purchase a portion of Zapotal for $15 million, with an option to purchase the remainder for an additional amount exceeding $8 million. Gorman stated that Phillip accepted the offer, but the sale never closed.

Gorman also testified that he had participated in the negotiations that resulted in DIC's sale of Zapotal to Union Box. Gorman stated that during these sales negotiations, Madrigal had represented Phillip with respect to Phillip's 75 percent interest in the property, and that Gorman had represented his own 25 percent interest. Gorman testified that, after the sale from DIC to Union Box was completed, he became involved in a dispute with Phillip regarding how much of the sale proceeds Gorman was owed. Gorman explained that he believed he was entitled to 25 percent of the $31 million sale price, but Phillip had offered him a substantially smaller payment.

On cross-examination, Gorman admitted he had filed a lawsuit against Phillip in Los Angeles Superior Court involving DIC's sale of Zapotal to Union Box. Gorman also admitted his claims against Phillip were dependent on a finding that Phillip was an owner of DIC. Gorman acknowledged he had no documentation showing Phillip had ever been a shareholder or owner of DIC, nor was he aware of any documentation confirming that Phillip had any current interest in DIC.

When presented with a copy of the written agreement between Phillip and DIC regarding the sale of Phillip's Zapotal option, Gorman testified that he was not aware of the document until Victoria's counsel had showed him a copy two days earlier,

and that he believed the document was "bogus." When asked why he believed the document was not legitimate, Gorman stated: "I base it on my knowledge of everything which happened because usually I was informed and copied and I would normally have been involved in drafting that document." Gorman also testified that he had reviewed Madrigal's testimony regarding Phillip's alleged sale of the Zapotal option to DIC, and stated that she was "lying." He further asserted that the law firm in Panama that had certified Phillip was never an owner of DIC had lied.

During his testimony, Gorman authenticated numerous e-mails that he had exchanged with Phillip and Madrigal regarding DIC and DIC's sale of Zapotal to Union Box. In a series of e-mails written in January 2006, Madrigal, Gorman and Phillip discussed what they should name a certain corporate entity, and ultimately agreed on "Development Investment Consult."

In another series of e-mails, the parties discussed the importance of distinguishing between Phillip and DIC. For example, on January 14, 2006, Madrigal wrote Gorman an e-mail stating: "I think we are planning to take [Phillip] out of the picture of any possible relation with Zapotal reason why the Panamanian company is the one who is going to be pay but with this letter, he could be connected [*sic*]. Are we still going this direction?" Similarly, in April 2006, Gorman asked Phillip whether the "intention was to keep [Phillip's] name out of it," to which Phillip replied, "Yes, a position should be established that keeps me from appearing in control. . . ." In March 2006, Madrigal wrote Phillip another e-mail that appeared to reference his relationship to DIC: "Regarding your question if the first right of refusal [on Guacayama] are still binding if you are no

longer in control, my answer is no. But if they go to Court, I have to say that they have enough prove to [*sic*] demonstrate that DIC and [Phillip] are at the end the same."

In another set of e-mails, Phillip directed Gorman and other parties to take certain actions regarding DIC's sale to Union Box. In an e-mail written in October 2006, Phillip proposed how he believed some of the proceeds of the sale between DIC and Union Box should be distributed.

Finally, an e-mail that Madrigal wrote to Gorman in April 2006 refers to a trust she established for Phillip: "Because the trust information is completely confidential, and at the end the beneficiary will be [Phillip], do you think it is necessary to have another company to be the beneficiary of the trust or can we put [Phillip] directly? According with the instructions given before [*sic*], [Phillip] will be the final beneficiary but you and me will be like a Board of Directors to give the trust instructions."[5]

C. Closing Briefs and the Trial Court's Ruling

1. Summary of the parties' closing briefs

In her closing brief, Victoria argued that Gorman's testimony, combined with the e-mails and other documents he had authenticated at trial, demonstrated that Phillip's sale of his Zapotal option to DIC was a sham, and that Phillip was in fact the true owner and beneficiary of DIC. Victoria contended that the e-mails showed Phillip had attempted to conceal his ownership of DIC, that he had controlled the sale between DIC

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[5] Victoria and Phillip each called several additional witnesses who testified at trial, including two experts in forensic accounting. The testimony of these additional witnesses, however, is not relevant to our resolution of the issues Victoria has raised in this appeal.

and Union Box and that the proceeds of the sale were being held for him in a trust.

Alternatively, Victoria argued that, even if Phillip was not the true owner and beneficiary of DIC, the undisputed evidence showed DIC had paid him approximately $21 million of the proceeds it had received from Union Box, rather than the $15 million that Phillip had disclosed to Victoria prior to trial. Victoria asserted that because Phillip had misrepresented the amount he had received from the sale, the court should award her an equivalency payment of $6 million.

Phillip, however, argued that his testimony, along with the testimony of Madrigal, Gomez and Chinchilla, demonstrated that he had no interest in DIC or its assets. Phillip further asserted that Gorman's testimony was speculative in nature, and that the e-mail excerpts Gorman had authenticated could "be interpreted in different [ways]." Phillip contended, however, that none of the documents contained any statements supporting Victoria's theory that he and the Costa Rican witnesses had engaged in a fraudulent conspiracy to hide his interest in DIC or to conceal assets.

2. The trial court's tentative decision

On July 13, 2013, the court announced its tentative decision, explaining that the question presented at trial was whether Phillip had retained "some interest in . . . DIC, or [had otherwise] received something in addition from DIC or the Zapotal transaction which ha[d] not been disclosed in the[] proceedings." The court further explained that because Victoria was the party "alleging the existence of some community property or community property rights," she had the "burden of proof."

The court then announced its verdict, stating that Victoria had provided "insufficient evidence . . . to justify the court finding that there are additional assets that [Phillip] is entitled to as a result of these transactions. . . . [The] court accepts [Phillip's] explanation for his actions where he had an investment of perhaps a million dollars or so in cash and an obligation of another 4 or 5 or more million to pay to acquire this property. . . . He was seeking to do something to ensure that he would be able to basically pull that transaction off involving other principals he felt was somewhat of a guarantee or at least would increase the odds of him pulling this off. Certainly, in hindsight we can say well, why didn't he just do this himself and earn himself another $10 million or so. But it was a dynamic situation, and things were changing day-to-day from e-mail to e-mail, but the evidence submitted by [Victoria] is based on opinion, mainly opinion of Mr. Gorman and speculation. Speculation that because . . . he could have done this, that he must have some secret deal."

The court acknowledged there were "inconsistences with a number of statements that [were] made during the course of the proceedings," but found that such inconsistencies did "not rise to the level of [Victoria's] burden of proof to establish that there are additional assets that could be divided in this case other than what's been disclosed from this particular transaction."

3. Statement of decision

Victoria filed a request for a statement of decision (see Code of Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590, (d)) that asked the court to provide the "factual and legal basis" for several of its findings, including its determination that Victoria had failed to prove that "DIC was the alter ego of [Phillip]"; that Phillip "use[d] DIC as a vehicle for hiding assets from [Victoria]";

and that Phillip failed to "disclose over $[6] million over and above the $15 million he received from sale of Zapotal."

The court issued a statement of decision that closely tracked the language of its oral tentative decision. The court explained that it had "judged the credibility of the evidence presented by both parties[, and] . . . found that there was *insufficient evidence* [emphasis in original] presented by [Victoria] to justify the court findings that there are additional assets that [Phillip] would be entitled to as a result of the transactions of DIC in the sale of Zapotal," beyond those that he had disclosed at trial.

The court further stated that it had "accepted [Phillip's] testimony and explanation for his actions," explaining that the evidence showed the "situation with [his] investments in Costa Rica were changing from day to day and email to email. Plans that would be created one day, were changed the following week based on a fluid investment situation. The fact that [Phillip] may have had plans to set up an off-shore corporation for future investments, was not persuasive in establishing that [he] planned to funnel assets or money with the intent to hide it from [Victoria]. . . . [¶] [T]he evidence submitted by Victoria, both in testimony and documentary, was based on opinion and speculation, mainly the personal opinion and speculation of David Gorman. It was speculation that [Phillip] would have or could have done something differently with his original option contract or the rights to Zapotal. [¶] . . . [T]he court rejected [Victoria's] theory that a 'secret' deal was struck between [Phillip] and the principals of DIC to hide money. The court also rejected [Victoria's] claim that [Phillip] perjured himself at various times during his testimony, in order to continue the allegation that

[Phillip] was hiding assets from the sale of Zapotal. . . . The court gave credence to [Phillip's] testimony that he is not, and was not, hiding or withholding any assets from Petitioner, associated with the sale of Zapotal . . . for $31 million."

DISCUSSION

A. Victoria Has Forfeited Her Argument that the Trial Court Erred in Assigning her the Burden of Proof

Victoria argues that the trial court erred when it assigned her the burden of proving her claims against Phillip. In her appellate briefing, Victoria acknowledges that, "ordinarily a claimant such as [herself] would carry the burden of proof at trial." (See generally *Morin v. ABA Recovery Service, Inc.* (1987) 195 Cal.App.3d 200, 210 ["'The basic rule, followed in California and elsewhere, is that whatever facts a party must affirmatively plead, he also has the burden of proving.' [Citation.] Under Evidence Code section 500, a party generally '. . . has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"'] [disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664].) She contends, however, that under the holding in *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1257 (*Margulis*), the court should have shifted the burden to Phillip to prove that he did not own DIC, or alternatively, that he did properly account for all of the money he received from DIC.[6]

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[6] In *Margulis*, the court held that "where the nonmanaging spouse offers prima facie evidence that community assets of a certain value have disappeared while in the control of the

Victoria has not cited any portion of the record that shows she raised this burden shifting argument in the trial court. "'It is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. . . .'" (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.) This rule is founded upon principles of "[f]airness. . . . Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) "Any other rule would ""permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not."' [Citations.]' [Citation]." (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412 (*Riva M.*); see also *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.) Our courts have previously applied these waiver principles to claims of error involving the burden of proof. (See *California Interstate Tel. Co.*

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managing spouse postseparation, . . . the managing spouse ha[s] the burden of proof to account for the missing assets[.]" (*Margulis, supra,* 198 Cal.App.4th at p. 1257.) Victoria contends the trial court should have applied *Margulis's* burden shifting rule in this case because she provided prima facie evidence that DIC was Phillip's alter-ego or, alternatively, that he did not account for all the proceeds he received from the sale.

v. Prescott (1964) 228 Cal.App.2d 408, 411 [party forfeited argument regarding shift of burden of proof by failing to object in trial court]; *Riva M., supra*, 235 Cal.App.3d at p. 411 ["By failing to object, [appellant] waived any error in using the clear and convincing evidence standard of proof"]; *Bank of Santa Ana v. Molina* (1969) 1 Cal.App.3d 607, 623 [appellant waived argument that trial court misstated the burden of proof by failing to raise argument at trial].)

The record demonstrates that Victoria had numerous opportunities to raise her burden of proof argument in the trial court. First, during closing argument, Phillip's counsel specifically emphasized that Victoria had the burden of proof on her claims. Victoria's counsel did not object to this statement, nor did counsel contend in her own closing argument that the court should depart from the normal rules governing the burden of proof.[7] Second, when the court announced its tentative decision, it expressly stated that Victoria had the burden of proving her claims, and that the court did not believe she had satisfied that burden. Although Victoria's counsel asked the court numerous questions about its tentative findings, counsel

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[7] At oral argument, Victoria's appellate counsel asserted that he believed trial counsel had raised the burden-shifting issue during closing argument, but was unable to provide a record citation. Based on our independent review of the record, we have identified only one instance where Victoria's trial counsel mentioned the burden-shifting rule set forth in *Margulis*. In that instance, however, counsel made only a passing reference to the burden-shifting rule, and never asserted that the rule applied in this case. Moreover, Victoria's trial counsel repeatedly acknowledged during closing argument that Victoria, not Phillip, had the burden of proof on her claims.

again failed to raise any issue related to the burden of proof. Third, Victoria filed a request for a statement of decision that listed a wide range of issues she wanted the court to address; the burden of proof was not among those issues. Finally, although the court's statement of decision again expressly stated that Victoria had the burden of proving her claims, Victoria did not file an objection to the statement asserting that the court had misapplied the burden of proof.

By repeatedly failing to object to the trial court and opposing counsel's express statements regarding the burden of proof, Victoria deprived Phillip and the court of an opportunity to address the argument she now presents for the first time on appeal. Moreover, Victoria has provided no explanation why the well-established waiver rules prohibiting appellants from raising issues for the first time on appeal are inapplicable here. Accordingly, we deem her burden of proof argument waived.

B. The Evidence at Trial Did Not Compel Findings in Victoria's Favor

Victoria next contends that, even if she did have the burden of proof on her claims, the evidence at trial established Phillip breached his fiduciary duties by concealing his ownership interest in DIC, misrepresenting the true amount that DIC paid him, and selling the Zapotal option to DIC at below market value.

1. Standard of review and the doctrine of implied findings

"'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . .' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133

(*Arceneaux*).) "'The burden of affirmatively demonstrating error is on the appellant.'" (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

"Under the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision." (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 48 (*Fladeboe*).) To avoid an implied finding, a party must follow the two-step process provided by Code of Civil Procedure sections 632 and 634 (see *Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134): "[F]irst, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision [citation]; second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment [citation]." (*Id.* at p. 1134.) "If a party fails to bring omissions or ambiguities in the statement of decision to the trial court's attention, . . . the reviewing court will infer the trial court made implied factual findings to support the judgment, even on issues not addressed in the statement of decision." (*Ibid.*; see also *Fladeboe, supra*, 150 Cal.App.4th at pp. 48, 59-60.)

Generally, we review express and implied findings of fact in a statement of decision for substantial evidence. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462 (*SFPP*).) Under the substantial evidence test, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . ." (*Jessup Farms v. Baldwin* (1983) 33

Cal.3d 639, 660*; Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.)

The substantial evidence test, however, "'is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . .' [Citations.]" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) Rather, when the "'the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."' [Citation.]" (*Ibid.*) As with the traditional substantial evidence test, "[t]he appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment. [Citation.]" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.)

2. The evidence does not compel a finding that Phillip owned DIC or retained an interest in DIC's assets

Victoria argues there "was no substantial evidence to support the finding that DIC was not the alter-ego of [Phillip]." As noted above, given the trial court's express statements that it found Victoria failed to satisfy her burden of proof on her claims,

the question on appeal is whether the evidence compelled a finding as a matter of law that Phillip breached his fiduciary duties by concealing an ownership interest in DIC. Victoria's assertion that the evidence compelled such a finding is meritless.

At trial, Phillip, Madrigal, Gomez and Chinchilla all testified that Phillip never had any ownership interest in DIC or in the company's assets. All four of these witnesses also provided consistent testimony describing the history and terms of the sales between Phillip and DIC, and then DIC and Union Box. The witnesses' testimony was supported by numerous documents, including a written sales agreement between Phillip and DIC, a certified statement from DIC's Panamanian law firm confirming that Phillip was never a shareholder, executive or officer of DIC, and stock registries showing Madrigal, Gomez and Chinchilla collectively owned 100 percent of the company's shares.

The testimony of Victoria's primary witness, David Gorman, did not compel a contrary finding. Although Gorman repeatedly testified that he believed Phillip owned and controlled a majority share of DIC, Gorman acknowledged he had never seen any documentation confirming that fact. Moreover, Phillip, Madrigal and Chinchilla each testified that DIC had, for various strategic reasons, elected to keep Phillip's sale of his Zapotal option to DIC confidential from Gorman, suggesting there was a reason why Gorman might have been mistaken as to the true owner of the property.

The evidence at trial also showed there were numerous reasons to question Gorman's credibility. First, Gorman acknowledged on cross-examination that he had filed a lawsuit against Phillip regarding the sale of Zapotal, and that his claims were dependent on a finding that Phillip was the owner of DIC.

Second, throughout his testimony, Gorman repeatedly claimed interests in Zapotal that were not supported by any documentary evidence. For example, Gorman claimed that before Phillip purchased the option to Zapotal, Golfina had given Gorman a 10 percent interest in the property. There was, however, no documentary evidence introduced at trial confirming that 10 percent interest, and the sales agreement between Phillip and Golfina contained no reference to any such 10 percent interest. Gorman also claimed Phillip had assigned him a 25 percent ownership interest in DIC, but was again unable to identify any signed documentation supporting that allegation.

In her appellate brief, Victoria places much emphasis on the e-mails Gorman authenticated at trial, which contain language suggesting, among other things, that Phillip controlled some aspects of DIC's sale to Union Box, that he did not want to appear to be in control of DIC, and that Madrigal had set up a trust for him. As the trial court noted, the specific meaning of the language in those e-mails is difficult to discern because Gorman did not testify as to the specific context in which they were written. What is clear, however, is that nothing in the e-mails compels a finding that Phillip owned DIC, or was otherwise entitled to the profits DIC received from the Zapotal transaction.

3. The evidence does not compel a finding that Phillip failed to disclose an additional $6 million that he received from the Zapotal transaction

Victoria next asserts that although Phillip initially claimed he had sold his Zapotal option to DIC for $15 million, the undisputed evidence at trial demonstrated that DIC actually paid him in excess of $21 million. She contends that Phillip's failure to disclose this additional $6 million payout constituted a breach

of his fiduciary duties that entitled her to an equivalency payment of at least $3 million. (See Fam. Code, § 1101, subd. (g) ["Remedies for breach of the fiduciary duty by one spouse . . . shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty. . . ."].)

The trial court's statement of decision does not address Victoria's claim regarding Phillip's allegedly undisclosed additional $6 million payment. However, because Victoria did not file any objections to the statement of decision requesting further clarification of this issue, we are compelled under the doctrine of implied findings to infer that the court found she failed to establish this claim. (See *Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134):

The specific nature of Victoria's argument regarding the allegedly undisclosed $6 million payment is difficult to discern. Although she asserts that Phillip "adamantly stated DIC only paid him $15 million for the sale of Zapotal," the record shows that Phillip and the three Costa Rican witnesses all acknowledged that DIC paid him three separate payments totaling approximately $21 million: (1) the $15 million that DIC had agreed to pay Phillip for the Zapotal option; (2) a $4 million payment to repay Phillip a loan that enabled DIC to pay off the remaining amount of the option agreement with Golfina; and (3) a $2.125 million payment that DIC agreed to make if Union Box purchased Zapotal. Phillip further testified that he transferred all of these proceeds, less taxes and costs pertaining to the transaction, into various financial accounts in the United States that he held jointly with Victoria. He clarified that these

accounts were later consolidated into an Ameritrade account. His community property declaration, in turn, shows that his Ameritrade account held $9 million in assets.

In her appellate brief, Victoria has cited no evidence showing that Phillip ever denied having received more than $15 million from DIC, nor has she cited any evidence contradicting Phillip's testimony that he transferred all the proceeds he received from the DIC into their jointly held accounts. Instead, she merely asserts, without citation to evidence, that "the community was divided based not on $21[] Million, but rather the $15 Million [Phillip] claimed" to have received in the Zapotal sale. Victoria's conclusory assertions are insufficient to compel a finding that Phillip concealed an additional $6 million in assets.

4. The evidence does not compel a finding that Phillip sold the Zapotal option to DIC at below market value

Victoria also argues that if we affirm the trial court's finding that she failed to prove Phillip owned DIC, the evidence nonetheless compels a finding that he breached his fiduciary duties by selling his Zapotal option to DIC at substantially less than market value.[8] She contends that two pieces of evidence establish Phillip's Zapotal option was worth substantially more than $15 million. First, Gorman testified that, shortly before Phillip sold his option to DIC, Union Box had offered to purchase a portion of Zapotal for $15 million, with an option to buy another

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[8] Although Victoria raised this argument in her closing trial brief, she did not ask the court to address the issue in her request for a statement of decision, nor did she object to the statement of decision for failing to address this issue. We must therefore infer the court found against her on this claim. (*Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134.)

section of the property for $8 million. Second, approximately six months after Phillip sold his option to DIC, Union Box agreed to buy the entire property from DIC for $31 million. Victoria argues that, considered together, this evidence shows the true value of the Zapotal option was at least $23 million.

We find no basis to conclude that the evidence Victoria cites conclusively establishes that Phillip's Zapotal option was worth substantially more than $15 million at the time he sold it to DIC. Regarding the first piece of evidence, Phillip testified at trial that although Union Box did offer to buy a portion of Zapotal for $15 million, with an option to buy another portion of the land for $8 million, it abruptly rescinded that offer shortly after Phillip signaled he would accept that price. As to Union Box's decision to purchase Zapotal from DIC for $31 million six months after Phillip sold it to DIC, Victoria has cited no evidence that this amount reflected the true market value of the property. Simply put, the fact that one entity was willing to pay a certain price for a piece of property does not, standing alone, compel a finding that the price paid reflected the actual market value of the property six months earlier.

C. Victoria Has Failed to Establish the Court Abused its Discretion in Denying Her Request to Recall Gorman to Testify for a Third Time

Finally, Victoria argues the trial court abused its discretion when it denied her request to recall Gorman to testify for a third time. The record shows that Victoria made the request after the court allowed Phillip to recall Madrigal to testify about stock registries and other documents that purportedly showed she, Gomez and Chinchilla were the owners of DIC. The trial court also permitted Gomez and Chinchilla to provide similar

testimony, and to describe their respective roles in the Zapotal transaction. Victoria argued to the court that although Gorman had already testified twice in the matter–once before Madrigal and Phillip's initial testimony, and once after–he should nonetheless be permitted to testify again to impeach Madrigal, Gomez and Chinchilla's latest testimony about the creation and ownership of DIC. The trial court denied Victoria's request.

In her appellate brief, Victoria argues that "Gorman should have been allowed to return and give his testimony. . . . Gorman, with his direct involvement in the formation and running of DIC, would have first-hand knowledge of such facts, and should have been allowed to rebut the questionable testimony of Madrigal, Gomez and Chinchilla concerning their ownership of DIC. Had Gorman properly rebutted their testimony, a trier of fact would disbelieve the Costa Rican witnesses."

Evidence Code section 778 provides the court discretion to decide whether to permit a party to recall a witness. (See Evid. Code, § 778 ["After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion"].) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Cooks* (1983) 141 Cal.App.3d 224, 327 [reviewing refusal to allow counsel to recall witness for abuse of discretion].)

A party seeking to reverse a judgment based on the allegation that the court erroneously admitted evidence has an

affirmative duty to show not only that the court erred, but also that the error was prejudicial. (See *Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1224 [appellant claiming evidentiary error must "affirmatively demonstrate[] prejudice"; Evid. Code, § 354; Code of Civil Proc., § 475; *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119 [to prevail on evidentiary claim, appellant must "show error affirmatively in the evidentiary rulings," and additionally show how "that eviden[tiary ruling] was prejudicial"].) "Claims of evidentiary error under California law are reviewed for prejudice applying the 'miscarriage of justice' or 'reasonably probable' harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818. . . . Under the *Watson* harmless error standard, it is the burden of appellants to show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred. [Citation.]" (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447.)

Victoria has failed to make an adequate showing of error or prejudice. As summarized above, Gorman was permitted to testify twice in the case. During his initial testimony, he testified at length about his alleged role in forming DIC, his belief that Phillip owned DIC, and the sales negotiations between DIC and Union Box. Gorman was allowed to testify a second time after Madrigal had presented her own testimony regarding the formation and ownership structure of DIC, and the sales transactions between Phillip, DIC and Union Box. During his second period of testimony, Gorman specifically addressed Madrigal's testimony, asserting that she had lied. He likewise testified that the Panamanian law firm that certified Phillip was never a shareholder in DIC had lied.

In her appellate brief, Victoria contends the court should have allowed her to recall Gorman for a third time so that he could provide further testimony about "the formation and running of DIC." Victoria, however, has failed to identify what further testimony Gorman intended to provide, or the basis for that testimony. Nor has she explained why it is reasonably probable that this new, unidentified testimony would have resulted in a more favorable outcome at trial.

Victoria appears to imply that we should independently review the record to determine what further testimony Gorman might have provided, and whether that testimony might have affected the outcome of the trial. However, "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793 [it "is not our role" to "construct a theory supportive of " appellant's claims]; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["An appellate court is not required to examine undeveloped claims, nor to make arguments for parties"]; *Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 615 ["conclusory assertion of prejudice" insufficient to satisfy appellant's "burden of affirmatively demonstrating the existence of a prejudicial error"].) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why. [Citation.]" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.